

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant.

Case No. 18-cv-175
ECF Case

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendant United States Environmental Protection Agency (EPA) is violating the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by failing to disclose responsive records requested by Plaintiff Natural Resources Defense Council (NRDC).

2. Since July 18, 2017, EPA Administrator Scott Pruitt has traveled to at least eleven states on a “State Action Tour,” to discuss environmental issues with selected state and local leaders and stakeholders. This case involves a simple document request seeking information about the decision making and planning of these trips.

3. On August 3, 2017, NRDC submitted a FOIA request to EPA.

4. The statutory deadline to produce the requested documents was August 31, 2017. EPA has not produced any records to NRDC in response to this request, and has not indicated whether or how it intends to respond.

5. NRDC seeks a declaration that EPA has violated FOIA by failing to provide a final determination as to whether it will comply with NRDC’s request and by failing to produce responsive records by the statutory deadline. NRDC seeks an injunction ordering EPA to provide all non-exempt, responsive records without further delay.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this district because Plaintiff NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

PARTIES

8. Plaintiff NRDC is a national not-for-profit environmental and public health advocacy organization with hundreds of thousands of members nationwide. On behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment.

9. Defendant EPA is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of records NRDC seeks.

STATUTORY AND REGULATORY FRAMEWORK

10. FOIA requires federal agencies to release records to the public upon request, unless a statutory exemption from disclosure applies. 5 U.S.C. § 552(a)-(b).

11. An agency must determine whether to comply with a FOIA request within twenty business days of receiving it. *Id.* § 552(a)(6)(A)(i); *see also* 40 C.F.R. § 2.104(a). The agency must “immediately notify” the requester of “such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i). If an agency determines that it will comply with a request, it must “promptly” release responsive, non-exempt records to the requester. *Id.* § 552(a)(6)(C)(i).

12. An agency may seek an extension to the statutory deadline in the event of “unusual circumstances.” *Id.* § 552(a)(6)(B)(i). To invoke this exception the agency must

provide the requester with written notice setting forth the unusual circumstances and the expected date for responding to the request. *Id.*

13. If the agency fails to respond within the statutory time limit, the requester is “deemed to have exhausted his administrative remedies” and may immediately file suit. *Id.* § 552(a)(6)(C)(i); *see also* 40 C.F.R. § 2.104(l).

14. District courts may “enjoin the agency from withholding agency records” and “order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

15. On June 29, 2015, EPA and the U.S. Army Corps of Engineers (Army Corps) issued a rule titled “Clean Water Rule: Definition of ‘Waters of the United States.’” 80 Fed. Reg. 37,054. Many parties sued to challenge the rule, including the State of Oklahoma by its then-Attorney General, Scott Pruitt.

16. On June 27, 2017, EPA, now under Administrator Scott Pruitt, and the Army Corps announced a proposal to rescind the 2015 Clean Water Rule. The proposal was published in the Federal Register on July 27, 2017. 82 Fed. Reg. 34,899. Public comments on the proposal were accepted until September 27, 2017. 82 Fed. Reg. 39,712.

17. On July 18, 2017, EPA issued a News Release announcing that Administrator Pruitt “began a multistate tour in Utah today where he held talks with state and local leaders regarding EPA issues that are important to Utah, including the

agency's recent proposal to rescind the 2015 'Waters of the United States' (WOTUS) rule." The Release stated that Administrator Pruitt met with various Utah government officials as well as "stakeholders including those from Utah's water conservation, farming, mining, and energy sectors."

18. EPA has issued similar News Releases announcing that Administrator Pruitt has traveled to ten other states as part of this "State Action Tour." These EPA News Releases document that at the "State Action Tour" stops, Administrator Pruitt has characterized the 2015 Clean Water Rule as overreaching, creating uncertainty, and threatening economic growth. The EPA News Releases also document similar comments critical of the 2015 Clean Water Rule expressed by other government officials as well as the agriculture, mining, development, and energy groups Administrator Pruitt has met with at the various "State Action Tour" stops.

19. During the Colorado tour, for example, Administrator Pruitt attended an event organized by the National Cattlemen's Beef Association. The Association produced a video in which Administrator Pruitt appears; in it, he criticized the 2015 Clean Water Rule and urged the Association's members to submit comments on the proposal to rescind the Rule. The Association's video directed viewers to visit BeefUSA.org, which instructed visitors to "Tell EPA to Kill WOTUS Today!" and provided sample comments that were critical of the Rule for visitors to submit.

20. On August 3, 2017, NRDC filed a FOIA request with EPA for records in EPA's possession, custody, or control relating to (1) the process, planning, or criteria used to decide which states would be visited by Administrator Scott Pruitt on his "State Action Tour," and (2) the process, planning, or criteria used to decide which non-EPA persons, organizations, or entities to invite to attend any meeting with EPA officials during the "State Action Tour." The FOIA request is appended to this complaint as Attachment A.

21. In its request, NRDC asked EPA to waive any fees for the search and production of the requested records on the grounds that disclosure of the requested records is in the public interest, 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l), and that NRDC qualifies as a "representative of the news media," 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(b)(6), (c)(1)(iii).

22. EPA assigned this request tracking number EPA-HQ-2017-010175.

23. In a letter dated September 1, 2017, EPA granted NRDC's fee-waiver request. The letter stated that EPA's Office of the Administrator would respond to the request.

24. There were no further communications from EPA about this request, and EPA has not produced any responsive documents to NRDC.

25. EPA's response to NRDC's request was due by August 31, 2017. 5 U.S.C. § 552(a)(6)(A)(i); *see also* 40 C.F.R. § 2.104(a). EPA did not request an extension of this deadline.

CLAIM FOR RELIEF

26. Plaintiff incorporates by reference all preceding paragraphs.

27. NRDC has a statutory right under FOIA to receive a full response to its request by the statutory deadline, which has passed.

28. NRDC has a right under FOIA to promptly obtain all records that are responsive to its request and not exempt from disclosure.

29. EPA has violated its statutory duty under FOIA, 5 U.S.C. § 552(a), to respond to NRDC's request and to release all non-exempt, responsive records to NRDC.

REQUEST FOR RELIEF

NRDC respectfully requests that this Court enter judgment against Defendant as follows:

A. Declaring that EPA violated FOIA by failing to issue a determination on, and to release all non-exempt records responsive to, NRDC's FOIA request;

B. Directing EPA to disclose all non-exempt requested records to NRDC without further delay;

C. Directing EPA to produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event that EPA determines that certain responsive records are exempt from disclosure;

D. Retaining jurisdiction over this case to rule on any assertions by EPA that certain responsive records are exempt from disclosure;

E. Awarding NRDC its costs and reasonable attorneys' fees; and

F. Granting such other relief that the Court considers just and proper.

Dated: January 9, 2018

Respectfully submitted,

/s/ Nancy S. Marks

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Attachment A to Complaint

*August 3, 2017 Freedom of Information Act
Request*

NATURAL RESOURCES DEFENSE COUNCIL

August 3, 2017

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

**Re: Freedom of Information Act Request for State Action Tour Locations
and Participants**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

I. Description of Records Sought

First, we request any records related to the process, planning, or criteria used to decide which states would be visited by Administrator Scott Pruitt on his “State Action Tour,” which appears to have begun in Utah on July 18th, 2017.¹ Second, we request any records related to the process, planning, or criteria used to decide which non-EPA persons, organizations, or entities to invite to attend any meeting with EPA officials during the “State Action Tour.”

The term “records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, receipts, invoices, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

¹ News Release, Environmental Protection Agency, PHOTOS: EPA Administrator Pruitt Visits Utah to Kick-Off State Action Tour, Announce Decision to Revisit Utah Regional Haze Plan (Jul. 18, 2017), available at <https://www.epa.gov/newsreleases/photos-epa-administrator-pruitt-visits-utah-kick-state-action-tour-announce-decision>; see also Sammy Fretwell, *EPA administrator shuns green groups, meets with businesses, during SC visit*, THE STATE (Jul. 24, 2017), available at <http://www.thestate.com/news/local/article163395088.html> (detailing one such meeting).

This request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure meets both of these requirements.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The requested records will illuminate the nature of Administrator Pruitt’s agenda during the State Action Tour, and how he and his staff are using their time on the Tour. The requested records therefore concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii), and there is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). The records will reveal information about Administrator Pruitt’s meetings with state and business interests, which is the subject of considerable public interest but is not in the public record.² Disclosure of the requested records would therefore meaningfully inform public understanding with respect to a topic of public interest, and the requested records are not publicly available.

² *See, e.g.,* Sarah Bowman, *Environmental groups miffed EPA chief doesn't include them in visit to discuss Clean Water*, INDIANAPOLIS STAR (Aug. 2, 2017), available at <http://www.indystar.com/story/news/2017/08/02/epa-chief-leaves-out-indiana-environment-groups-during-visit/534313001/>.

3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.*

NRDC's extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of the Administration's views and opinions with respect to EPA. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.

- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); see also “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- NRDC Document Bank, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe”. See also Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives. See also P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. See *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); see also William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. See *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. After the report’s publication, the

sonar issue continued to attract widespread public attention. See, e.g., “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007.

- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. See Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004.
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration’s Energy Task Force, along with analysis of selected excerpts and links to the administration’s index of withheld documents. NRDC’s efforts cast light on an issue of considerable public interest. See, e.g., Elizabeth Shogren, “Bush Gets One-Two Punch on Energy,” *L.A. Times*, Mar. 28, 2002, at A22.
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel,” Apr. 3, 2002; Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19.
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

4. *Significance of the contribution to public understanding*

The requested records are critical to understanding a matter of considerable public interest and concern: namely, the nature of EPA's interaction with the entities it was created to regulate. These records are likely to significantly contribute to public understanding of the matter.

B. **NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, the requested records relate to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

III. **Willingness to Pay Fees Under Protest**

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). **But please contact me before doing anything that would cause the fee to exceed \$100.** NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. **Conclusion**

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA's has already retrieved and elected to produce. See *generally* 40 C.F.R. § 2.104 (describing response deadlines).

If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Jon Devine

A handwritten signature in black ink, appearing to be 'JD' with a stylized flourish.

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